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IN RE THE ESTATE OF KAVENA MOHAMED YOOSUF Deceased ESTATE & TRUST AGENCIES (1927) LTD. v. FATIMAH SHAM BINTE HAJI SAHIB (W), AND 5 ORS.

[C.A. (Burton Ag. C.J., Thomas C.J. (F.M.S.) and Terrell J.) July 3, 1935]

[Singapore Appeal No. 3 of 1935]

Building contract — Erection of buildings on settled property — Non-completion before death of testator — Right of executor to have contract completed at cost of testator's personal estate — Administration of estate — Civil Procedure Code, ss.68 and 72.

A testator, the probate of whose will was revoked for improper execution, settled certain property in favour of his infant son. During his lifetime the testator had entered into a contract for the erection on the settled property of six houses which remained uncompleted at the time of his death. The executor of the will expended a sum of $17,276 on completing the houses.

Held, by the Court of Appeal reversing the order of Prichard J. that the cost of completing the six houses should fall on the personal estate of the testator.

In *Re Day, Sprake* v. *Day,* [1898] 2 Ch. 510, applied.

Application made by the plaintiffs by way of originating summons and adjourned into open Court for argument. The application raised a question relating to the administration of the estate of Kavena Mohamed Yoosuf deceased.

The material facts and the question for determination by the Court are incoroporated in the judgment of the Court of Appeal below.

In the Court below the following judgment was delivered:

Prichard J.: This was an originating summons taken out by Estate & Trust Agencies (1927) Limited for the determination of the following questions:—

(a) Since monies totalling $17,276 have been expended after the death of the settlor by the 6th defendant, (the sole executor of an alleged will of the settlor which has been revoked, set aside and cancelled by this Court) on completing six shop houses on certain vacant lands which are comprised in the abovementioned settlement, do such monies fall to be paid out of the properties comprised in the settlement or by the beneficiaries thereof, or must they be paid out of the estate in respect of which the settlor died intestate?

(b) Whether the 6th defendant who claims 5% commission on the capital value of the settled and intestate estates as such executor as aforesaid is entitled to such or any other remuneration and to clerk and collectors' wages in addition thereto.

(c) Whether the 6th defendant is entitled to 5% commission charged and received by him as such executor as aforesaid on the gross rents and profits collected by him from the intestate estate without the sanction of this Court?

(d) For such directions, enquiries and accounts as may be necessary in the premises.

(e) For directions as to who should bear the costs incurred by the 6th defendant as such executor as aforesaid in connection with the handing over the administration of the intestate's estate to the plaintiffs.

(f) Costs.

(g) General administration of the estate if and so far as the Court may think necessary.

It appeared that Kavena Hadjee Mohamed Yoosuf deceased (hereinafter called the deceased) on the 3rd January, 1927, settled certain lands in Singapore on himself and his Singapore wife, Fatima Sham binte Hadji Sahib upon certain trusts. The properties were divided into three schedules. Those comprised in the 1st schedule were put in trust for Fatimah Sham binte Hadji Sahib. Those comprised in the 2nd schedule for his daughter, Maimoona Sham and those comprised in the 3rd schedule for his son, Kader Ebrahim. This settlement was partly revoked by the deceased on the 20th February, 1928. The 1st schedule was left untouched, the 2nd was completely revoked, as were items 1 and 2 of the 3rd schedule, but not the others. Previous to this revocation, viz: on 15th July, 1927, the deceased had entered into a building contract for the erection of seven shop houses on part of the land comprised in the 3rd schedule. Only six were actually erected and the deceased and the 6th defendant, the sole executor of his will paid for the work. On the same day as the revocation the deceased mortgaged part of the properties removed from the settlement to secure an over-draft with the Netherlands Trading Society. The 6th defendant subsequently executed a 2nd mortgage. The deceased died on the 18th July, 1928 leaving a will which on the 7th January, 1932, was pronounced invalid by the Court and the probate of which had been granted to the 6th defendant was set aside.

The deceased consequently died intestate. On the 3rd February, 1932, the plaintiffs were appointed administrator *pendente lite* with powers limited to those of receivers, and on the 15th July, 1932, they were granted letters of administration.

After the death of deceased the 6th defendant continued the building operations and completed them and made payments of $17,000 odd to the contractor.

[2] The moneys were taken out of the intestate estate and paid to the settlement account by the 6th defendant. [2]

The principal question that now arises is whether the moneys spent on the completion ought to be borne by the settled or by the intestate estate.

Three cases were referred to in the course of the arrangements, viz: *Holt* v. *Holt,* 24 English Reports, p. 808; *Cooper* v. *Jarman,* L.R. 3 Equity, p. 98, and *Sprake* v. *Oay* [1898] 2 Ch. p. 510. None of these cases cover the exact point raised in our case. On general principles of equity I cannot see why the next-of-kin should suffer or why the settlement should benefit, owing to the action of the executor. I consider the executor was quite justified in making the payment he did, and that it was for the benefit of the estate as a whole. But I see no reason why now the estate should not be placed in *statu quo ante.* If the executor had come and asked the Court's opinion the Court would certainly have sanctioned completion of the building operations.

Accordingly I make *an order for general administration.* The Registrar should take an account as to what is due now by the settled to the intestate estate, also as claimed in (b) and (c) of the summons. As regards (d) and (e) these claims can be dealt with on the further consideration. The executor should furnish an account up to the date when he handed over to the plaintiffs. Mr. Wotherspon should file an account as to what plaintiffs claim from the settled estate. Question of costs reserved. Liberty to apply.

From this decision the third defendant (Kader Ebrahim) appealed.

COURT OF APPEAL.

Koek for the appellant.
Page for the plaintiffs.
Briggs for the 1st and 2nd defendants.
Mallal for the 4th and 5th defendants.
Seth for the 6th defendant.

Cur. Adv. Vult.

Burton Ag. C.J.: This is an appeal from part of a judgment of Prichard J. which decided that the sum of $17,276 spent by Ahmad Angullia, the 6th defendant, after the death of K.H.M.Y. on completing some buildings on land settled during his lifetime on his son, Kader Ebrahim. Kavena Hadjee Mohamed Yoosuf was a Mohamedan Indian of considerable property. He had a wife in India and a wife, Fatima Sham and a son, Kader Ebrahim in Singapore. On 3rd January, 1927, he made a settlement of some of his property; he conveyed it to himself and his wife, Fatima Sham in trust to himself for life. He divided the settled estate into three parts; the lands contained in the first schedule went to Fatima Sham absolutely, those in the second Schedule to his daughter, Maimoona Sham, and those in the third schedule to his son, Kader Ebrahim.

He died on 18th July, 1928. On his death the property in the first schedule vested in Fatima Sham absolutely; and he had revoked the second schedule during his lifetime on a power reserved in the settlement, and we are not concerned with these. By the same deed as revoked Schedule II of the settlement, he revoked also items 1 and 2 in the Schedule III. The rest of the property contained in the third schedule remained settled on his son, Kader Ebrahim. During his minority the income was to be paid for the benefit of Maimoona and Kader Ebrahim, and on his attaining his majority the whole was to go to him absolutely. There was a gift over if Kader Ebrahim died before attaining majority. It is clear therefore that Kader Ebrahim has a vested interest in this property which is subject to be divested if he dies before attaining the age of twenty-one.

The deceased left a document purporting to be a will in which he appointed Ahmed Angullia the sixth defendant as his "trustworthy trustee"; probate of this will was granted to Angullia on 10th September, 1928, and he proceeded to administer the estate. He acted till the probate was revoked on 7th January, 1933 on the ground of irregularity in the execution of the will, and there was no representative of the deceased till letters of administration were granted to the plaintiff company on 13th June, 1933.

During his lifetime the deceased had entered into a contract to build seven houses on part of the land settled on Kader Ebrahim. Six of these houses were started and remained unfinished at his death. Angullia as executor spent $17,276 on completing these six houses. No question arises as to the building of the seventh. On 16th May, 1934 the plaintiffs issued this originating summons asking for determination of the question:

> Since monies totalling $17,276 have been expended after the death of the settlor by the 6th defendant, (the sole executor of an alleged will of the settlor which has been revoked, set aside and cancelled by this Court) on completing 6 shop houses on certain vacant lands which are comprised in the above-mentioned settlement, do such monies fall to be paid out of the properties comprised in the settlement or by the beneficiaries thereof, or must they be paid out of the estate in respect of which the settlor died intestate?

The deceased left part of his estate settled and part fell to be divided as on an intestacy and I think that in these proceedings the intestate estate and the settled estate have been confused. I do not think that the plaintiffs have any interest in the settled estate. That was conveyed to trustees, and except that the deceased retained a life interest in the property and the power of revocation, he had completely alienated the property from himself, and upon his death it vested in the surviving trustee in trust for Kader Ebrahim. This property therefore did not pass at the death, and consequently did not [3] pass to the executor. This [3] settled property was therefore the estate of a stranger, and the money spent upon the completion of the houses on the settled property by Angullia was the testator's money spent for the benefit of the estate of a stranger. The root principle is laid down in *Bain* v. *Brand,* 1 App. Cases 762 where at p. 766 Lord Cairns L.C. said:

> "My Lords, the case therefore being, in my opinion, uncovered by any decision which has settled the law upon the subject, I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are, with regard to matters of this kind, which are included under the comprehensive term of 'fixtures,' two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance."

and at p. 772 Lord Chelmsford said:

> "The law as to fixtures is the same in Scotland as in England. The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed

becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim '*Quicquid plantatur solo solo cedit*'."

There is no question of ignorance or mistake; Angullia deliberately completed these houses knowing that they were being constructed on the land settled on Kader Ebrahim. Neither has section 12(2) of the Civil Law Ordinance any application to this case.

In the case of *In re Day, Sprake* v. *Day,* [1898] 2 Ch. 510 the testator Joseph Addison Day entered into two contracts, one to erect some cottages upon part of the property he had devised to Mrs. Sprake-Day and one for the erection of a house on some land situated at Misterton which belonged to Mrs. Sprake-Day. Neither of the contracts had been completed at the time of the testator's death; and the judgment of North J. with respect to the Misterton property seems to me to have a direct bearing in this case. He says at p. 513:

"But I do not think it applies to the Misterton property which was not given by the testator's will. That property had at some time before his death been conveyed direct to Mrs. Sprake-Day at his instance. Then the testator entered into a contract for the building of four cottages upon this land. This contract has not been completed, but the person entitled to the benefit of it has carried in a claim against the testator's estate, and it appears from the chief clerk's note that a certain sum has been allowed. I do not see that any claim has been made by Mrs. Sprake-Day in respect of this property. The property was conveyed to her out and out, and the testator entered into some contract with respect to it, but whether under such circumstances that she could have compelled him to carry out the contract I do not know. I can understand that there might be circumstances under which he would have been bound to carry out such a contract, by reason of some consideration moving from her to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a stranger — the owner of the property before the testator's death and not taking it under his will — can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out."

In this case the contracts had not been completed, but in my view, it makes no difference to the question now to be decided whether the contract has been carried out or not. I am not concerned at the moment with any questions of liability, if any, between the intestate estate and Angullia. They have not been argued and may have to be decided separately; all I have to decide now is whether or not the settled estate should reimburse the intestate estate, and I am of opinion that it should not. In our present case if the question had been asked in time the decision would have been the same as in the case of the Misterton property in *In re Day, supra,* but instead Angullia completed the contract which the deceased had made. It was argued that he was bound to do so. But I do not think he was. When he was appointed executor he was faced with this liability, and it was his duty to minimise it. It might have been cheaper for him to break the contract and pay damages. But that is not a matter which falls to be considered in this case. I think that the appeal must be allowed and the decision of Prichard J. reversed and the question in the originating summons answered that the sum of $17,276 should not be paid out of the properties comprising in the settlement. The consequent orders for accounts should be also set aside.

Thomas C.J. (F.M.S.): In this appeal the memorandum contained three grounds of appeal. The second and third have been abandoned, and there remains only one question for this Court, viz. whether the cost of completing six shop houses, after the same had been completed and paid for out of the intestate's estate, were recoverable by the intestate's administrator out of the settled estates.

[4] Now Kavena Hadjee Mohamed Yoosuf, [4] hereinafter referred to as the settlor, by a deed dated the 3rd of January, 1927, settled certain portions of his property, retaining for himself a life interest, and appointing himself and his wife, Fatimah Sham binte Hadjee Sahib the trustees. He also reserved to himself the right to revoke any part of the settlement by deed.

Three trusts were originally created by this settlement. The first was in favour of his wife, the second in favour of his daughter, and the third after providing for the expenditure and investment of the income during the son's minority eventually gave the property absolutely to the son on his attaining the age of twenty-one years.

By a subsequent deed the settlement in favour of the daughter was revoked, and the settlement in favour of the son was also revoked as to certain of the property included therein.

On the 15th of July, 1927 the settlor entered into a contract for the erection of a number of shop houses on a parcel of land included in the settlement in favour of his son. This parcel of land continued in the settlement in favour of the son at the time of the death of the settlor. The settlor died on the 18th of July. On the 10th of September, 1928 probate was granted of a will of the settlor to Ahmed Angullia bin Hadjee Mohamed Salleh Angullia (hereinafter referred to as the executor).

This probate was revoked on the 7th of January, 1932, on the grounds that the will had been improperly executed. There was in consequence an intestacy of the estate of the settlor. Prior to the death of the settlor he had expended considerable sums in connection with the building contract. At the time of his death six of the shop houses contracted for remained unfinished, and the executor prior to the revocation of the probate expended a sum of about $17,276 on the completion of these six shop houses. There were other shop houses included in the contract, but no question arises as to these.

In respect of this expenditure an originating summons was taken out on the 16th of May, 1934 asking for the determination of the following amongst other questions:—

"Since moneys totalling $17,276 have been expended after the death of the settlor by the 6th defendant (the sole executor of an alleged will of the settlor which has been revoked, set aside and cancelled by this Court) on completing six shophouses on certain vacant lands which are comprised in the above-mentioned settlement, did such moneys fail to be paid out of the properties comprised in the settlement or by the beneficiaries thereof, or must they be paid out of the estate in respect of which the settlor died intestate?"

This originating summons came on for hearing before Prichard J. who in making his order said:—

"On general principles of equity I cannot see why the next-of-kin should suffer or why the settlement should benefit, owing to the action of the executor. I consider the executor was quite justified in making the payments he did, and that it was for the benefit of the estate as a whole. But I see no reason why now the estate should not be placed in *statu quo ante*. If the executor had come and asked the Court's opinion the Court would certainly have sanctioned the completion of the building operations."

But if such an application had been made the whole question as to liability would have been gone into; the widow and the infants would have been represented, and their consent obtained. It has been stated that the widow (Fatimah Sham binte Hadji Saheb) is a purdahnasheen lady who takes no interest in the management of the trust estate. But that is no reason why the executor should undertake unasked any of her duties, and it has nowhere been suggested that the executor has at any time been asked to do anything in respect of the settled estate. And if the opinion of the Court had been asked for and sanction had been obtained for the completion of the building operations, presumably, the Court would have decided at whose expense the work should be carried out.

That is really the question before the Court. And it is in my opinion decided by the case of *Cooper* v. *Jarman* (1866) 3 Equity, 98. The head-note to that case is as follows:—

"A person contracted with a builder to erect a house on a piece of freehold land belonging to him and died intestate before the house was finished. *Held* — that the heir at law was entitled to have the house finished at the expense of the personal estate of the intestate."

I do not consider it necessary to set out the reasons of Lord Romilly M.R. for his judgment. In that case the intestate might at any time have made a will. In the absence of a will he must be presumed to have known that the land would go to his heir at law.

In the present case the settlor might at any time have revoked the settlement, and in the absence of so doing he knew that the land would eventually go to his son.

In the case of *In re Day, Sprake* v. *Day,* [1898] 2 Ch. 510, it was held that a devisee of land was entitled to have a building contracted for but not completed in the life time of the testator completed at the cost of the testator's estate. But it was also held that in respect to a contract for the erection of buildings upon land belonging to a devisee by an independent title, which had not been completed during the life time of the testator, such devisee was not entitled
[5] to have [5] them completed at the cost of the personal estate. This latter property did not pass to the devisee on the death of the testator. It had been conveyed to the devisee some time before the death of the testator. In his judgment North J. says:—

"But the evidence which has been adduced does not establish any liability of that kind; and I do not see how a person who for this purpose is a stranger — the owner of the property before the testator's death and not taking it under his will — can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out."

In the present case one of these important elements is absent. The appellant was not the owner of the property before the settlor's death. There was an interest subject to his attaining the age of twenty-one years; but also it was subject to its being revoked at any time by deed during the lifetime of the settlor.

In my opinion, therefore, the settled estate was entitled to have these shop houses completed at the cost of the intestate estate. Apart therefrom I agree with the judgment of the learned President (which I have had the advantage of reading) when he says:—

"There is no question of ignorance or mistake; Angullia deliberately completed these houses knowing that they were being constructed on the land settld on Kader Ebrahim."

Therefore this appeal must be allowed, and the decision of Prichard J. reversed, and the question answered that the sum of $17,276 should not be paid out of the properties comprised in the settlement.

Terrell J.: Kavena Hadjee Mohamed Yoosuf (hereinafter called Mohamed Yoosuf) died on the 18th July, 1928 leaving property, settled and unsettled, to the value of about $250,000. The settled property included certain vacant lots at Serangoon Road, Singapore. They were settled by an Indenture of Settlement dated the 3rd January, 1927 upon himself for life and after his death upon trusts in favour of his son the third defendant. The trustees were Mohamed Yoosuf and his wife Fatimah the first defendant.

On the 15th July, 1927 Mohamed Yoosuf contracted with one Tan Peck Hood for the building of seven houses upon the vacant land at Serangoon Road. Subsequently the contract appears to have been varied and the contractor agreed to erect six houses at a cost of $44,572. At the date of the testator's death the buildings were not completed, and a balance of some $16,000 remained due to the contractor for such completion.

On the 10th September, 1928 the sixth defendant as executor propounded a will and probate thereof was duly granted to him. On the 7th January, 1932, however, in Probate 342/28, the Probate was revoked by Order of Court on the ground that the will had not been properly executed. In the meantime the executor had raised money by mortgaging a proportion of the unsettled estate and had completed the building of the houses on the settled property. After the revocation of the probate the present plaintiffs were appointed administrators and by this originating summons applied to the Court for the determination of various questions, and in particular whether the moneys expended by the sixth defendant in completing the six houses should be paid out of the settled estate or out of the unsettled estate. So far as the persons interested in the settlement are concerned the real question is whether the settlement should repay the moneys paid by the sixth defendant for completing the houses. By his order dated 10th October, 1934 Prichard J. found *inter alia* that the cost of completing the six houses should be paid out of the properties comprised in the settlement, and directed an account of what was due by the settled estate to the unsettled estate. It is against so much of the order of the learned Judge that this appeal is brought.

It appears that although the first defendant was made a party to the originating summons she was not sued as surviving trustee of the settlement, but as a

beneficiary in the intestate estate, and that accordingly the settlement as such was not strictly represented. This, however, has been remedied by an Order made in Originating Summons 57/35 whereby the third defendant was given leave to prosecute the appeal on behalf of the settled estate.

The only evidence filed on the application was an affidavit by Mr. Wotherspoon who is an official in the Estate & Trust Agencies, together with the exhibits to such affidavit and a file of agreed correspondence. There is no affidavit either by the sixth defendant, the person who completed the houses, or by the first defendant, the sole surviving trustee of the settlement. It is quite impossible therefore for the Court to say why and under what circumstances the sixth defendant diverted large sums of money from the estate of which he was executor for the benefit of the settled estate with which he was not concerned. There is no evidence that such payments were made at the request of the first defendant. The third defendant who principally benefits obviously could not have influenced the matter as he was then, and still is, a minor. In these circumstances the sixth defendant must be looked upon as a stranger to the settlement who was building on another person's land, not with any claim of right but knowing that it belonged to another. If that was the case there is no principle of equity which requires the person who has benefited to repay money which has been expended (see *Ramsden* v. *Dyson,* L.R. 1 Eng. and Ir. App., p. 129 at p. 141), and with all respect [6] to the learned trial Judge I fail to see [6] that the executor was justified in making the payment he did or that it was for the benefit of the estate as a whole. The only estate in which the executor was interested was the unsettled estate and it cannot have been to the benefit of the unsettled estate that part of it should be devoted to benefiting some one else's property. Although the third defendant is also a beneficiary in the unsettled estate yet as between the two estates he can only be regarded as a stranger.

I agree with the learned trial Judge that the cases of *Cooper* v. *Jarman,* L.R. 3 Eq. p. 99 and *Sprake* v. *Day,* [1898] 2 Ch. p. 510 do not cover the points raised in these proceedings. They only seem to show that if the sixth defendant had refused to complete the building the first defendant could not have compelled him to do so. The liability of the estate of Mohamed Yoosuf in respect of his contract with Tan Peck Hood is of course a different matter which does not now arise, and I also express no opinion as to whether the sixth defendant is personally liable to the intestate estate for the amount expended.

I would therefore allow the appeal and vary the order of Pritchard J. by omitting the finding that the cost of completing the shop houses should be paid out of the settled estate, and the orders for accounts in connection therewith.

Appeal allowed.

Solicitors: *Chan & Eber; Allen & Gledhill; Braddell Bros.; Mallal & Namazie; Sisson & Delay.*

Re KHOR BAK KEE

[C.A. (Burton Ag. C.J., Thomas C.J. (F.M.S.) and Howes J.) October 7, 1935]

[Penang Civil Appeal No. 2 of 1935]

Bankruptcy — Fraudulent conveyance — Ordinance No. 44 (Bankruptcy), ss.3(1)(b), 46.

Where a bankrupt conveyed to his wife his interest in a certain land for a small consideration on the day before he closed his business, and there was no record in his books of the transactions in question,

Held: that on the facts of the case there was a strong inference of fact that the wife had knowledge of the husband's impending bankruptcy and that the assignment of the property was a fraudulent conveyance within the meaning of section 3(1)(b) of Ordinance No. 44 (Bankruptcy).

On the 18th of November, 1933, the bankrupt abovenamed who was trading under the firm name of Chop Hup Joo at Bukit Mertajam assigned to his wife, Tan Ah Poon, his interest in a certain piece of land for a consideration stated to be $100. The day after the conveyance had been executed, the bankrupt closed his shop. He was adjudged bankrupt in Bankruptcy No. 22 of 1934 on the 9th March, 1934. Tan Ah Poon then sold the property to one Khor Neoh Kheh. The Official Assignee of the bankrupt's property applied to the Court in bankruptcy for orders setting aside the two conveyances to Tan Ah Poon and Khor Neoh Keh respectively as being fraudulent and void as against the applicant.

Whitley J. decided that the conveyance was fraudulent within section 3(1)(b) of the Bankruptcy Ordinance and on the 22nd day of March, 1935, made an order setting aside the conveyances. Against this order Khor Neoh Keh appealed and the appeal was heard before Mr. Justice William Burton, Acting Chief Justice, Sir Samuel Thomas, Chief Justice, Federated Malay States, and Mr. Justice Howes, and dismissed.

Somasundrum for the appellant.

Moor, Official Assignee, in person.

Cur. Adv. Vult.

Burton Ag. C.J.: Khor Bak Kee, who was trading under the style of Chop Heap Joo of Bukit Mertajam was adjudicated a bankrupt on 9th March, 1934. On 18th November, 1933, the bankrupt conveyed a one-seventh undivided interest in a piece of land to his wife, Tan Ah Poon for a stated consideration of $100. On 28th May, 1934, she conveyed the undivided share to Khor Neoh Keh for $240. Khor Bak Kee had bought it twenty years before for $420.

Whitley J. held that the conveyance to Tan Ah Poon was fraudulent and void as against the Official Assignee in Bankruptcy, that the conveyance from Tan Ah Poon to Khor Neoh Keh was also void as against the Official Assignee, and that the undivided share formed part of the assets of the bankrupt divisible amongst his creditors.

Against this judgment Khor Neoh Keh has appealed.

Whether or not the judgment of Whitley J. is correct depends in my opinion on the date of the act of